No. 488

IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

UNITED STATES OF AMERICA, APPELLANT

v.

RAYMOND J. WISE, APPELLEE

ON APPEAL FROM THE
UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF MISSOURI

BRIEF FOR APPELLEE

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INDEX

CITATIONS

CASES:

PAGE

STATUTES:

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QUESTION PRESENTED

The question presented by this appeal is whether a corporate representative who acts solely in a representative capacity may be prosecuted under the Sherman Antitrust Act, 26 Stat. 209, as amended, 69 Stat. 282, 15 U.S.C. § 1 *et seq.*, if he authorizes or orders an act connected with an antitrust violation on the part of the corporation, or instead whether he may be prosecuted only under Section 14 of the Clayton Act, 38 Stat. 736, 15 U.S.C. § 24.[1]

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1. Indictment, Par. 75, 83 (R. 6-7, 9); Government Bill of Particulars, Answer to Par. 1(a) (b) (R. 34-35); Notice of Appeal, III (R. 43).

STATEMENT

The district court dismissed as to the appellee two Sherman Act counts of the indictment on the ground that these counts charged the appellee only with acting for his corporation in a representative capacity. (R. 39)[2] The court held that such charges do not properly lie under the Sherman Antitrust Act. The Government having conceded in a bill of particulars that the appellee was indicted solely for things done in his representative capacity (R. 34), the court held that such conduct is completely covered by the provisions of Section 14 of the Clayton Act, and must be prosecuted under those provisions. The Government having disavowed any reliance on Section 14, the court held that dismissal of the counts in question was the appropriate course (196 F. Supp. 155).[3]

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2. In this brief, the abbreviation "R." designates the printed Transcript of Record on Appeal; "G.B." designates the Government's Brief on appeal herein. When used in this brief, the phrase "corporate representative", means a corporate director, officer or agent acting solely in a representative capacity on behalf of his corporation.

3. The indictment is still pending in the district court as to counts charging the corporation with violation of the Sherman Act. Certain other counts charging the appellee and the corporation with violations of Section 3 of the Robinson-Patman Act were dismissed by the district court on constitutional grounds. An appeal from the latter holding in *United States* v. *National Dairy Products Corp.*, No. 173, this Term, has been briefed and argued and decision by this Court is pending.

SUMMARY OF ARGUMENT

I

Appellee, Raymond J. Wise, is charged in the language of a statute which has a maximum fine of $5,000 (Section 14 of the Clayton Act) but is prosecuted under a statute which has a maximum fine of $50,000 (Section 1 of the Sherman Act).

The Sherman Act indictment of a corporate officer, Wise, for authorizing or ordering purely corporate acts is in disregard of the intent of Congress and contrary to the plain meaning of the statutory language. It is clear as a matter of plain meaning that the statute which penalizes the corporate officers for authorizing or ordering corporate acts which result in corporate antitrust violations is not the Sherman Act, but Section 14 of the Clayton Act.

II

In 1890 Congress decided to postpone bringing corporate representatives within the Sherman Act, although it had under serious consideration several proposals to include them. A desire to move slowly in this new legislative field and to overcome the opposition to broad criminal penalties brought about a compromise deferring sanctions against individuals not acting for their own account. Thereafter, for twenty-four years Congress gave careful and constant atten-

tion to this subject, and finally in 1914 agreed on a proposal to penalize corporate officials and employees for their participation in antitrust violations by their corporations. Prior to that time, there were no decisions inconsistent with the clearly evident intent of Congress, and in 1913 this Court gave tacit recognition to the fact that no court had decided that corporate representatives as such were subject to the Sherman Act.

III

Congress knew that it had not covered corporate representatives in the Sherman Act, and would not have given the subject extended, detailed consideration for twenty-four years and affirmative action in 1914, had it believed otherwise.

The Congressional reports and debates, the action taken, and even the opposition of the minority demonstrate beyond question that Congress (recognizing that the Sherman Act covered corporate officials only if they were acting independently of their corporations or using the corporation as a puppet for individual purposes) intended by Section 14 to extend criminal antitrust penalties to corporate representatives for the first time, and to cover them from then on in an all-inclusive provision. Furthermore, the deliberate decision to reject application of aider and abettor provisions in any form conclusively shows that Congress intended Section 14 to be the exclusive statute penalizing corporate personnel who participate as representatives in corporate antitrust violations.

IV

For forty-one years while Sherman Act and Section 14 penalties were the same, the issue presented here lay dormant because corporate officials did not appear to have anything to gain by claiming that they should be prosecuted under Section 14 and not under the Sherman Act. During this period the relationship of the two sections was not tested or decided. This Court, however, in 1945 in a civil antitrust case recognized and applied the distinction between a corporate official acting for his own account and one acting solely for his corporation and significantly recognized that a corresponding distinction pertained to criminal liability, with Section 14 as the statute that applied to representative participation in criminal corporate violations.

The issue now presented originated in 1955 when Congress, desiring to increase the penalties on business entities, particularly corporations, raised Sherman Act fines to $50,000. The issue was first decided by the court below, and since that decision there have been four additional decisions and opinions holding Section 14 to be the exclusive section applicable. There is only one contrary opinion, which is dictum on this issue, and possibly one additional contrary, but unexplained decision.

The statutory framework dealing with criminal antitrust violations by a corporate entity draws a sharp distinction between penalties against the corporation and penalties against its representatives. The court below properly applied the statutory mandate.

ARGUMENT

INTRODUCTION

The appellee was indicted for having "authorized or ordered" certain acts alleged to have been done by his corporate employer, National Dairy Products Corporation, in violation of the Sherman Act. The charges come directly within the scope of Section 14 of the Clayton Act, and are actually a virtual copy of that section. Section 14 states:

> "Whenever a corporation shall violate any of the penal provisions of the antitrust laws, such violation shall be deemed to be also that of the individual directors, officers, or agents of such corporation who shall have *authorized, ordered,* or *done* any of the acts constituting in whole or in part such violation, and such violation shall be deemed a misdemeanor, and upon conviction therefor of any such director, officer, or agent he shall be punished by a fine of not exceeding $5,000 or by imprisonment for not exceeding one year, or by both, in the discretion of the court." (Emphasis supplied)

The district court held that this section, not the Sherman Act, is the foundation for and the limitation upon the criminal liability of corporate officers. The decision was the first case to rule directly upon the issue since the enactment of Section 14. As the Government has pointed out, this appeal involves a case of first impression (Juris. State. 5).

Since the district court's decision, four other courts in cases presenting the same issue have concurred, holding in

reported opinions that Section 14 is the exclusive basis for prosecution of such cases. In *United States* v. *A. P. Woodson Co.*, 198 F. Supp. 582, 584 (D.D.C. 1961), Judge McLaughlin held that Congress intended the Sherman Act "to apply exclusively to corporate trusts and individuals acting in their individual capacities", and that Section 14 of the Clayton Act "was intended to be the exclusive remedy against corporate officials acting in their corporate capacities." In *United States* v. *American Optical Co.*, 1961 Trade Cases, Par. 70,156 (E.D. Wis. 1961), Judge Tehan's opinion stated that he was "in complete agreement" with the decisions and the reasoning in *National Dairy* and *Woodson*. In *United States* v. *Milk Distributors Ass'n., Inc.*, 200 F. Supp. 792 (D.Md. 1961), Judge Watkins referred to the above decisions as "Three well-reasoned opinions" and held that "Section 14 of the Clayton Act is exclusive as to charges against individuals in their representative capacity" (*Id.* 801). The same decision was also reached, with a summary opinion, in *United States* v. *General Motors Corp.*, Cr. No. 30,132 (S.D. Cal. 1962). 1962 Trade Cases Par. 70203.[4]

The only contrary opinion[5] rendered on this issue is

4. The Government has filed a notice of appeal to this Court in the *American Optical* and *General Motors* cases. It has appealed to the Court of Appeals for the District of Columbia in the *Woodson* case. (G.B. 10, note 2)

5. *Cf.* the Government's statement that a similar motion was denied in *United States* v. *Packard-Bell Electronics Corp.* (S.D. Cal.) (G.B. 10, note 2). There was no opinion, however, and it is noteworthy that the indictment also contains charges under Section 14, 5 CCH Trade Reg. Rep. par. 45,061, case 1632.

United States v. *North American Van Lines, Inc.*, Cr. No. 527-61 (D.D.C. 1962), where Judge Matthews denied a motion to dismiss Sherman Act counts against corporate officers. (G.B., App. C.) The decision is not in point, however, since the Government, itself, construed the indictment as charging the individual defendants in a dual capacity, *i.e.* as representatives and "in a personal capacity," and the court expressly rested its decision upon that ground (G.B. 83, 92-93). The opinion of the court on other issues is clearly dictum.

There were no decisions on this issue prior to these recent cases. Although the Government has habitually ignored Section 14 and has customarily indicted corporate representatives under the Sherman Act,[6] defendants have heretofore not had occasion to raise the issue. The reason for this hiatus is clear and the past judicial failure to resolve the issue has no significance on this appeal. Until 1955, the penalties for violation of Section 14 and of the Sherman Act were the same. Individual defendants had no incentive to attempt test cases on this issue with the likely prospect of only an academic victory. But on July 7, 1955, Congress decided to increase the maximum fine under the Sherman Act to

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6. Evidently the only case in which the Government obtained an indictment under Section 14 prior to the district court decision in the instant case was *United States* v. *Potts*, Cr. No. 56-157-N (D. Mass.) (G.B. 51) filed June 28, 1956. This case does not reveal any obstacles to Government use of Section 14. The district court granted the Government's own motion for *nolle prosequi* after indictments charging corporate defendants were dismissed for failure to state an offense (CCH Trade Regulation Reports, New U. S. Antitrust Cases 1957-1961, Par. 45,003, Case No. 1294).

$50,000, while retaining the original maximum fine of $5,000 under Section 14 (69 Stat. 282). The importance of then attacking the erroneous premise upon which prosecution of corporate representatives had theretofore been founded by the Government became clear for the first time. Otherwise the Government would have the option of proceeding against corporate representatives under either one of two statutes with widely divergent penalties.[6a]

6a. Judge Watkins in *Milk Distributors*, 200 F. Supp. 792, 799 pointed out these dangers, referring to "overtones" implicit in *Berra* v. *United States*, 351 U. S. 131 (1956). These overtones in *Berra*, to which he referred, are emphasized by the dissenting opinion of Mr. Justice Black (in which Mr. Justice Douglas joined). In reply to the Government's argument that it may proceed under either of two criminal statutes, a question the majority did not find necessary to decide in that case, Mr. Justice Black, stated:

> "The Government argues that the action of the trial judge must be upheld because 'the Government may choose to invoke either applicable law,' and 'the prosecution may be for a felony even though the Government could have elected to prosecute for a misdemeanor.' Election by the Government of course means election by a prosecuting attorney or the Attorney General. I object to any such interpretation . . . I think we should construe these sections so as not to place control over the liberty of citizens in the unreviewable discretion of one individual—a result which seems to me to be wholly incompatible with our system of justice."
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> * * *
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> "Substitution of the prosecutor's caprice for the adjudicatory process is an action I am not willing to attribute to Congress in the absence of clear command. Our system of justice rests on the conception of impersonality in the criminal law. This great protection to freedom is lost if the Government is right in its contention here." (351 U.S. at 138, 140.)

The strong majority response of the district courts since the issue has been squarely presented has been based upon the intent of Congress, as clearly manifested in the language of the statutes concerned and in the pertinent legislative history, as we shall show in succeeding sections of this brief.[7]

I.

THE PERTINENT STATUTORY PROVISIONS, WHEN READ TOGETHER, REQUIRE THAT CORPORATE REPRESENTATIVES BE PROSECUTED UNDER THE PROVISIONS OF SECTION 14 AND NOT UNDER THE SHERMAN ACT.

The issues on this appeal turn upon a reading of Section 14 of the Clayton Act and of the substantive provisions and definition section of the Sherman Act. These statutory provisions must be read together, for they are integral parts of a single system of antitrust policy and enforcement. When they are read together, it is clear from their wording and inherent meaning that Congress has provided in Section 14 the exclusive basis for and the measure of the criminal liability of corporate personnel acting in a representative capacity.

The District Court in the present case followed customary rules of statutory interpretation in dismissing the Sher-

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7. The Government suggests (G.B. 13) that if it is required to follow Section 14, it will encounter certain difficulties. To the extent that any difficulties are specified, they seem minor on their face. (*Ibid.*) In any event, procedural difficulty for the prosecution is not a valid reason for ignoring the intent of Congress.

man Act counts as to appellee and in holding that the liability of one in appellee's position must be established under and governed by Section 14. As the court stated, this result is:

> "in accord with the fundamental principle that courts are bound to give effect to the various sections of legislation and should avoid a construction which would render a statute a nullity. Any other interpretation would leave Section 14 without content or force." (196 F.Supp. at 157)

A. The Language and the Substantive Meaning of Section 14 Require That Corporate Representatives Be Prosecuted Under Its Terms for the Conduct Described Therein.

It is not necessary to go beyond the language and terms of Section 14 to resolve the issue on this appeal. In direct, uncomplicated language the statute states: "*Whenever*" a corporation violates any penal provision of the antitrust laws, such violation shall be deemed also to be "that of the individual directors, officers, or agents . . . who shall have authorized, ordered, or done any of the acts constituting in whole or in part such violation." This violation (by the corporate representative) is to be deemed a misdemeanor under this section and "punished by a fine of not exceeding $5,000 or by imprisonment for not exceeding one year, or by both, in the discretion of the court."

The plain meaning of these words is that "whenever"

(which means "at whatever time")[8] the described situation occurs of participation by a corporate official in a corporate violation, the official shall be convicted and punished according to the prohibitions and the limitations of this section.

Section 14 is a complete and comprehensive prohibition. It deals with the whole subject of participation by corporate officials in corporate violations. While it looks to the "penal provisions" of the antitrust laws, *e.g.* the Sherman Act, or the Wilson Tariff Act, 28 Stat. 570, 15 U.S.C. § 8, for interdiction of the corporate violation, it does not provide that the individual corporate official shall be convicted and punished under the penal provisions violated by the corporation. On the contrary, it provides its own standards and its own punishment. It dictates that the violation with which the individual is to be charged is the misdemeanor provided for by this section. The individual is to be convicted of *this* misdemeanor, and punished as provided in *this* section.

The Government has offered no construction which will gives this language any meaning other than its plain signification. Its only comment is that Section 14 does not contain words to negative prosecution for the same conduct under the Sherman Act (G. B. 11). But this is of no significance. In its criminal statutes, Congress affirmatively describes what is prohibited and how the offense is to be dealt with.

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8. Webster's Third New International Dictionary 2602 (1961).

Having described the offense comprehensively, Congress surely need not go on to say that prosecution shall *not* be carried on by the Justice Department under other earlier statutes having less or no express applicability.

The substantive scope of the prohibitions of Section 14 equally manifests Congressional intent to govern the subject of a corporate official's antitrust liability in this section. The statute expressly embraces all "directors, officers or agents" of the corporation. It provides for the conviction of all such individuals who have either "authorized," or "ordered," or "done" any of the acts which brought about the corporate violation. It applies regardless of whether such act or acts constituted the "whole" corporate violation, or were only a "part" of such violation. The statute thus applies to every kind of corporate representative and to every kind of conduct by such an official which could produce a corporate violation. In particular, it applies exactly to the allegations of the present indictment in which appellee was charged solely with having "authorized or ordered to be done some or all of the acts alleged" to have constituted Sherman Act violations on the part of the corporation, National. (R. 7, 9)

On its face, the statute thus defies the inference that Congress did not mean for this comprehensive provision to control the future prosecution of corporate representatives. The Government, however, contends that this broad provision has only the narrowest significance. Indeed, to the Govern-

ment, its contribution to the antitrust laws is envisioned as being so slight that barely any use for it at all can be discerned. The Government concedes only that Congress "*thought*" it was doing something new in enacting Section 14 (G. B. 47). Whether it really did so is, to the Government, a "difficult question." (*Ibid.*).

The question is difficult only if it is assumed that Congress was engaged in a largely useless activity in 1914. But since the Government concedes that the governing question on this appeal is the intent of Congress and that Congress *thought* it was doing something significant in enacting Section 14, it follows that the enactment must be given its face value as an expression of Congressional intent, and not be interpreted away into a meaningless and empty Congressional gesture.

Seeking some role for Section 14 in order to explain its enactment, the Government suggests that perhaps Congress added a very little to the supposed existing Sherman Act coverage by covering in Section 14 officers who have "authorized" corporate violations. Officers who have "ordered, or done" the acts, it is said, were already covered by the Sherman Act, but it was "doubtful" whether "authorizing" was covered (G.B. 45).

This attempted distinction between "ordering or doing" a violative corporate act and "authorizing" a corporate violation has no basis at all in the language of the Sherman

Act and is completely implausible, as shown by the fact that the Government does not support it either in theory or with precedent. It would seem beyond dispute that a superior corporate official who gives authority to carry out a violation would be every bit as culpable as the inferiors who carry it out. If the Sherman Act already possessed in 1914 the sweeping applicability to corporate officials claimed for it by the Government, it would have made no sense to doubt that it would reach the persons at the top who were more responsible than any others for the corporate violation.

As we point out in the next section, the real reason for inapplicability of the Sherman Act is that corporate officers are not "persons" within the meaning of the statute and are not dealt with by its substance. If they were, then the conspiracy provisions of the law would obviously cover those who "authorize" wrong-doing, as well as those who order it or commit it. It is elementary under the antitrust laws that knowing adherence to an unlawful conspiracy makes a "person," who legally is otherwise subject to the law, a conspirator. *United States* v. *Masonite Corp.*, 316 U. S. 265, 274-76 (1942); *Interstate Circuit, Inc.* v. *United States*, 306 U.S. 208, 226-27 (1939); *United States* v. *United States Gypsum Co.*, 333 U.S. 364, 389 (1948). Persons who have simply "acquiesced" in a conspiracy may be treated as part of it, *United States* v. *Paramount Pictures, Inc.*, 334 U.S. 131, 146-47 (1948). And participation in a Sherman Act conspiracy occurs at the moment of entry into an unlawful

agreement, with no overt action whatever being required. *United States* v. *Socony-Vacuum Oil Co.*, 310 U.S. 150, 224-26, note 59 (1940).[9]

In Section 14, Congress covered all categories of action by corporate officials. If it meant, as the Government claims, to add only a small bit to prior law, why did it thus cover the whole spectrum of conduct by those who have "authorized, ordered or done" the corporate wrong and the whole range of corporate personnel—"directors", "officers" and "agents"?

B. The Sherman Act Does Not, In Terms Or Substance, Embrace Corporate Officials Acting In a Purely Representative Capacity

Section 14 is so explicit that it could be held to have superseded the Sherman Act to the extent of its scope, were it necessary to do so. But it is not at all necessary for the Court to go that far, for the Government is in error in

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9. The attempt (G.B. 44) to use the remarks of Representative Floyd on the floor of the House in 1914 to support the Government's interpretation of Section 14 fails on its face. Representative Floyd said that Congress wanted not only to reach those who "authorized" corporate violations, but also those who "ordered" them. Both classes of persons were equally outside the Sherman Act to Mr. Floyd. But the Government is unwilling to concede that the Sherman Act ever failed to reach those who "ordered" violations (G.B. 45), and it thus agrees with half of his view and disagrees with the other half. The quoted statement of Mr. Floyd shows that Congress was counting on Section 14 to deal with all responsible corporate officials (G. B. 44-45).

phrasing the issue on this appeal in terms of whether there was supersession or implied repeal of Sherman Act coverage (G.B. 6, 32). The terms and substance of the Sherman Act simply do not cover corporate officials acting in their purely corporate, representative capacity.

The Government says that the phrase, "every person," in Section 1 of the Sherman Act "obviously includes a corporate official, and if such officials engage in the conduct prohibited by the Act, they are subject to the Act's criminal provisions" (G.B. 11). But there are two fundamental and erroneous assumptions underlying this statement. The phrase "every person" does not include corporate officials acting in their representative capacities. And while it is true that persons who are corporate officials may violate the Act through conduct undertaken for their own account and behalf, such officials cannot "engage in the conduct prohibited by the Act" when acting in a purely representative capacity.

The substance of the Sherman Act does not reach corporate representatives because the Act was aimed at individual entrepreneurs and business entities, whether corporate or non-corporate.[10] The language used plainly

10. This principle received early recognition in a Sherman Act case cited by the Government. *In re Greene*, 52 Fed. 104 (C.C. S.D. Ohio 1892) held, with respect to a Sherman Act indictment of an individual, that if the acts charged were criminal offenses, then his corporation was the "person" which committed the violations under the Sherman Act (*Id.* 119).

shows that Congress was thinking only of those who in legal contemplation are in a position to restrain trade or to monopolize. Section 1 prohibits in common law language, "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce***" These words obviously refer to the actions of economic entities. The section goes on explicitly to limit its prohibitions to those entities, by providing that "Every person" who shall make an illegal contract or "engage in" an illegal combination or conspiracy shall be guilty of the misdemeanor established by the statute. The term, "make" a contract, has a well-established legal meaning, plainly referring to the parties to the contract. The mere employee or agent who acts on behalf of a disclosed principal is never considered to be one who "makes" the contract.

Similarly, the term, "engage in" any combination or conspiracy in restraint of trade, does not aptly refer to a mere agent or employee of a business entity which restrains trade through combining or conspiring with others. A corporate representative, acting in that capacity, cannot reasonably be thought of as himself engaging in restraint of trade when his corporation violates the law. Trade is restrained by those business entities which are engaged in trade, not by their employees who, both legally and economically, have no power to restrain trade.

The flaw in the Government interpretation is revealed by the great theoretical difficulties it creates. If a corpo-

rate representative were to be regarded as "engaging in" the conspiracy of his corporate principal, it would mean that he would be a co-conspirator with his own corporation. But this would create havoc in the law, and would be directly contrary to the established principle that a corporate employee is legally incapable of conspiring with his own corporation where he acts within the scope of his employment. *Nelson Radio & Supply Co.* v. *Motorola, Inc.*, 200 F. 2d 911, 914 (5th Cir. 1952); *Goldlawr, Inc.* v. *Shubert*, 276 F. 2d 614, 617 (3d Cir. 1960); *Marion County Co-op. Ass'n* v. *Carnation Co.*, 114 F. Supp. 58, 62 (W.D. Ark. 1953). This principle was recognized before the passage of Section 14, as the Government acknowledges (G. B. 24).

The unsoundness of treating a corporate representative as within the substantive prohibitions of the Sherman Act is further demonstrated by reference to the terms of Section 2 of the Act. That section provides that "Every person who shall monopolize, or attempt to monopolize, or combine or conspire to monopolize . . ." shall be guilty. The word, "person," in this context plainly could mean only the entrepreneur, whether a corporation or an individual. It could not mean a mere agent of a corporation because such an agent would be totally incapable of "monopolizing" in his representative capacity.

The substantive inapplicability of the Sherman Act to corporate officers is further directly reflected in the fact

that the word, "person," as defined in the statute, does not include corporate officers. Section 8 of the Act (15 U.S.C. § 7) provides:

> "That the word 'person' or 'persons' wherever used in this Act shall be deemed to include corporations and associations existing under or authorized by the laws of either the United States, the laws of any of the Territories, the laws of any State, or the laws of any foreign country."

It is of great significance that this definition makes no mention of corporate officials. It is a basic premise of statutory construction that Congress cannot be deemed to have intended to punish anyone who is not "plainly and unmistakably" within the confines of the statute. *United States* v. *Lacher,* 134 U.S. 624, 628 (1890); *United States* v. *Cardiff,* 344 U.S. 174, 176 (1952); *United States* v. *Gradwell,* 243 U.S. 476, 485 (1917). The legislature must with reasonable certainty specify those encompassed by a penal provision. *United States* v. *Harris,* 177 U.S. 305 (1900); *Sarlls* v. *United States,* 152 U.S. 570 (1894). If Congress had meant to bring such officials within the scope of the law, it would have been an exceedingly simple thing to have done so expressly. See for example Bankruptcy Act, 30 Stat. 544, 11 U.S.C. § 1 (19). As the discussion of the legislative history of the Sherman Act in the next section shows, proposals to do that were common in Congress, but they were never accepted.

The Government attempts to give the word "person" in the Sherman Act an all-inclusive meaning, but cites no authority, apparently suggesting that whenever "person" is used in a statute it always includes all human beings whatever their status or capacity. But as used in statutes outlawing certain business practices its juristic definition is normally far more limited in scope and dependent upon the intent of the lawmakers.[11]

This Court has held that this word in the Sherman Act has a specialized significance which is not all-inclusive. In *United States* v. *Cooper Corp.*, 312 U.S. 600 (1941), the Government urged that the United States is a "person" under the Act, entitled to maintain a treble damage suit. The Court held otherwise, however, and in doing so flatly rejected the Government's contention that Section 8's definition should be liberally construed because "any other construction would turn words of inclusion into words of crippling limitation." The Court stated that "it is not our function to engraft on a statute additions which we think the legislature logically might or should have made." (*Id.* at 605; *cf. Georgia* v. *Evans*, 316 U.S. 159 (1942) holding that a state may maintain a damage action but agreeing with *Cooper* that "person" in the Sherman Act has a specialized

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11. Webster's Third New International Dictionary 1227 (1961) defines "juristic person" as "a body of persons, a corporation, a partnership, or other legal entity that is recognized by law as the subject of rights and duties—called also *artificial person, conventional person, fictitious person.*"

meaning to be derived from the intent of Congress.) It may with even greater force be said that it is not a necessary or desirable judicial function to engraft on one statutory provision a coverage which Congress has explicitly placed in a different provision.

As to a statute containing an analogous use of the word, "person," the Court has found that this word does not encompass corporate representatives. In *United States* v. *Dotterweich,* 320 U.S. 277 (1943), the Court indicated that it is the corporation, not the officer, which is directly covered by the word "person"[12] in the prohibitions of the Federal Food, Drug and Cosmetic Act. The dissent agreed,[13] the disagreement existing only as to the majority's holding that the corporate officer could nevertheless be held in that case as one who had aided and abetted the violation. As we will show in the later discussion in this brief of the legislative history of Section 14 of the Clayton Act, the general aiding and abetting approach for antitrust violations was specifically voted down and rejected by Congress in 1914, so that that theory can have no applicability in the present case.

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12. "To speak with technical accuracy, under § 301 a corporation may commit an offense and all persons who aid and abet its commission are equally guilty" (*Id.* 284).

13. "The normal and necessary meaning of such a definition of 'person' is to distinguish between individual enterprises and those enterprises that are incorporated or operated as a partnership or association, in order to subject them all to the Act. This phrase cannot be considered as an attempt to distinguish between individual officers of a corporation and the corporate entity" (*Id.* 287, n. 2).

In summary, the language and inherent meaning of the statutory provisions in issue are sufficient in themselves to dispose of this appeal. Section 14 clearly governs the conduct alleged in the indictment. The Sherman Act, both in terms and in substantive theory, clearly does not cover this particular conduct. While these provisions are themselves the most authoritative expression of the intent of Congress, it will be shown in succeeding sections that any conceivable doubts as to this conclusion are removed by the legislative history of the Sherman Act and of the Clayton Act, and that this result is not in the least inconsistent with cases relied upon by the Government brief.

II.

PRIOR TO THE ENACTMENT OF THE CLAYTON ACT IN 1914, CRIMINAL ANTITRUST PENALTIES DID NOT APPLY TO CORPORATE PERSONNEL ACTING SOLELY IN A REPRESENTATIVE CAPACITY.

A. Congress Considered But Rejected Penal Provisions Encompassing Corporate Representatives, Limiting Penal Coverage to Business Entities, Corporate and Non-Corporate

Congress has, on many occasions, demonstrated its ability to apply statutes in no uncertain terms to corporate officers as distinct from corporations.[14] For example, three

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14. Bankruptcy Act, 30 Stat. 544 (1898), 11 U.S.C. §§ 1, 11; Hours of Service Act, 34 Stat. 1416 (1907), 45 U.S.C. § 63, compare to Safety Appliances Act, 36 Stat. 299 (1910), 45 U.S.C. §13, and *Sherman* v. *United States,* 282 U. S. 25 (1930), decided thereunder; Ship Mortgages Act, 41 Stat. 1003 (1920), 46 U.S.C. § 941; Interstate Commerce Act, 24 Stat. 382 (1887), 49 U.S.C. § 10.

years prior to the enactment of the Sherman Act, Congress enacted just such a statute, the Interstate Commerce Act, 24 Stat. 382, § 2 (Feb. 4, 1887), which made any corporate director, officer, receiver, trustee, lessee, agent, or any person acting for or employed by such corporation, amenable to its penalties.

Beginning in 1888 and continuing through 1890, no less than twelve bills were introduced in both Houses of Congress which would have included corporate officers and agents within the penal prohibitions of the proposed antitrust bill. The following is a brief summation of the scope of these bills.

50th Congress (1888)

1. S. 3445, included officers, agents, and attorneys (of both corporations and individuals), stockholders, trustees, committees, and persons acting in "any capacity whatever."
2. H.R. 6113, included officers and directors.
3. H.R. 6117, included officers.
4. H.R. 11401, included agents, attorneys, and representatives of firms, copartnerships, corporations or associations.
5. H.R. 11534, same as H.R. 11401.

51st Congress (1889)

6. S. 1, same as S. 3445.
7. S. 62, included agents and managers.
8. H.R. 270, same as S. 3445.

9. H.R. 313, included officers.
10. H.R. 402, included agents and employees.
11. H.R. 830, same as H.R. 6113.
12. H.R. 3353, included persons acting in any capacity whatever.

The legislative consideration of two bills, the Sherman bill, S. 1, and the Reagan bill, S. 62, forerunners of the Sherman Act, which were considered by the Senate and submitted to the Committee on the Judiciary, most clearly establish the intention of Congress to omit corporate officers from penal coverage. The Sherman bill went through a rather intricate cycle of first being introduced without a penal provision, having one added, and then having it removed when finally submitted to the Committee on the Judiciary.

The penal provision, Section 3 of the bill, which was extremely comprehensive in coverage, covered officers and agents of corporations, agents and attorneys for "another," stockholders, trustees, committees, and persons acting in "any capacity whatever." With this penal provision, the bill was bitterly attacked, particularly by Senator George, a member of the Judiciary Committee. He emphasized that as a penal statute and therefore subject to strict construction, it would be held unconstitutional by the courts.

Senator Sherman subsequently amended the bill and eliminated Section 3, declaring that since Congress was

dealing with new subject matter the Committee on Finance considered it advisable "to declare the general principle of law, without any criminal section, leaving Congress to provide hereafter criminal penalties, as I have no doubt it will do if they shall be found to be necessary" (*Id.* 2562).[15] He further added that the primary concern of the act was to punish corporations, not their servants. "These corporations do not care about your criminal statutes aimed at their servants. They could give up at once one or two or three of their servants to bear this penalty for them" (*Id.* 2569). Although he finally approved the penal provision in the Reagan bill, which had been added as an amendment to his own, he made it clear that his original retreat from a strong bill was in deference to the "fears and timidity" of other Senators "who were afraid we were going too far" (*Id.* 2570).

The Reagan bill, unlike the original Sherman bill, had a limited penal provision when first introduced which subjected "any person who may be or may become a member of any such trust, or who may be or may become engaged in the business of any such trust" to criminal punishment. When Senator Sherman eliminated Section 3 of his bill, Senator Reagan submitted his own bill as an amendment, being of the opinion that absence of penal coverage would

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15. Senator Sherman also said, *"To punish the criminal intention of an officer is a much more difficult process and might be well left to the future"* (21 Cong. Rec. 2457). (Emphasis supplied.)

eviscerate the act. It is significant, however, that a new provision had been added to the Reagan bill which expanded penal coverage and specifically encompassed corporate agents and managers. This new provision provided:

> "That all persons engaged in the creation of any trust, or as owner or part owner, agent, or manager of any trust, employed in any business carried on with any foreign country, or between the States, . . . or any owner or part owner, *agent or manager of any corporation* using its powers for either of the purposes specified in the second section of this Act, shall be deemed guilty of a high misdemeanor, and, on conviction thereof, shall be fined in a sum not exceeding ten thousand dollars, or imprisonment at hard labor in the penitentiary not exceeding five years, or by both of said penalties, in the discretion of the court trying the same."

Though this penal provision included corporate officers, it was a considerable retreat from the broad scope of Section 3 of the Sherman bill.

In this posture the Sherman bill, without a penal provision, and the Reagan amendment with the above described penal section, were considered by the Senate and submitted to the Committee on the Judiciary (21 Cong. Rec. 2731). The Committee then redrafted the bill under the guidance of Senators Edmunds, George and Hoar, and the latter Senator submitted it to the Senate where it was eventually passed, 52 to 1 (*Id.* 3152).

The legislative history therefore demonstrates that Congress did not intend to cover corporate and other representatives for the following reasons:

1. Congress knew that it could, if it desired, broaden statutory coverage to include representatives and agents. It had enacted similar legislation which included representatives prior to its consideration of the Sherman Act. It had thoroughly considered proposals for inclusion in the Sherman Act which would have covered representatives and agents under the Sherman Act.

2. Having considered these proposals (specifically Section 3 of the original Sherman Bill and the Reagan Amendment), Congress rejected the broad coverage. This rejection of the broader coverage at the time of original enactment is a strong indication of legislative intent. *Blau* v. *Lehman*, 368 U.S. 403, 411 (1962).

3. Where the legislative history shows specific reasons for Congressional rejection of broader coverage, this is persuasive in determining Congressional intent. *Blau* v. *Lehman*, 368 U.S. 403, 411-12, n. 12 (1962). The reasons for not including corporate agents and representatives within the coverage of the Sherman Act are readily apparent. First, Congress was principally concerned with remedying the evils perpetrated by trusts and "single persons of large wealth." See *In re Greene*, 52 Fed. 104, 119 (C.C. S.D. Ohio 1892) where the court stated: "The enactment was manifestly aimed at the trust combinations and associations

formed by individuals and corporations, which the state courts in most instances have declared illegal."[16] Second, there was strong opposition in Congress to any criminal penalties as demonstrated by the position taken by Senator Sherman in deference to the "fear and timidity of others who were afraid we were going too far." Third, there is no indication that any Senator or Representative favored the all-encompassing coverage of proposed Section 3 of the Sherman bill, which was no broader than the Government's construction of Section 1 here.[17] Even the far more limited Reagan Amendment received only 34 affirmative votes with 12 senators voting against it. Fourth, there was an expressed desire on the part of Congress to proceed slowly, using a step by step approach and then "when the limits of the power of Congress over the subject-matter shall be defined by the courts" increase the scope of coverage where the need arose (21 Cong. Rec. 2456, 2457, 2570. See also

16. Senator George stated that he was "extremely anxious that some bill shall receive the assent of this Congress which will put an end forever to the practice, now becoming too common, of large corporations, and of single persons, too, of large wealth, so arranging that they dictate to the people of this country what they shall pay when they purchase, and what they shall receive when they sell" (21 Cong. Rec. 1458).

17. The Government's interpretation of "every person" in Section 1 of the Sherman Act is as broad if not broader than the phrase "person . . . in any capacity whatever" of Section 3 of the original Sherman bill. Senator Sherman stated that whether Section 3 of his bill should extend to office clerks as provided therein was a matter of grave doubt and an underlying reason for not including that provision in the bill (21 Cong. Rec. 2456).

the remarks of Senator Hoar, 36 Cong. Rec. 523, *infra*, at 35).

These reasons led to a compromise which included and accounted for the rejection of the broader coverage which would have made agents and representatives liable along with the business entities for whom they acted. This compromise is clearly shown in the subsequent evaporation of opposition to the Sherman Act in the Senate and the passage of the bill by a 52 to 1 vote.

B. After the Sherman Act Was Passed, Congress Did Not Regard It As Covering Representatives of Business Entities.

As shown in the preceding section, Congress did not intend that persons acting solely in a representative capacity should be individually liable under the Sherman Act; the Sherman Act was a compromise and broader coverage was to be left to the future. The legislative pattern from 1890 to 1914 bears this out completely. During that period no less than fifty-one bills[18] were introduced in Congress which proposed to amend the Sherman Act or supplement it,

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18. S. 1268, H.R. 166, H.R. 432, H.R. 4600, 52d Cong., 1st Sess. (1892); S. 682, S. 1167, 53d Cong., 1st Sess. (1893); S. 192, S. 244, 54th Cong., 1st Sess. (1895); S. 2330, H.R. 7492, 55th Cong., 1st Sess. (1897); H.R. 7938, 55th Cong., 2d Sess. (1898); H.R. 8199, H.R. 10539, H.R. 11001, H.R. 11002, H.R. 11667, 56th Cong., 1st Sess. (1900); S. 649, H.R. 3, H.R. 2069, H.R. 4581, 57th Cong., 1st Sess. (1901); H.R. 11988, H.R. 14947, 57th Cong., 1st Sess. (1902); S. 6600, S. 6659, 57th Cong., 2d Sess. (1902); H.R. 17051, 57th Cong., 2d Sess. (1903); H.R.

and which included language which would have covered persons acting solely in a representative capacity. This long parade of bills stretching from 1890 to 1914 cannot be dismissed as a mistaken belief by Congress that such an amendment or supplement was necessary, as the Government implies (G.B. 33-34, n. 15). Instead they represent a studied and persistent conviction on the part of Congress that the Sherman Act applied to business entities but not to their representatives. This conviction stemmed from and was in accord with the legislative history of the Sherman Act discussed under point A. above.

An examination of the bills starting in 1892 and continuing until 1914 demonstrates that this question was constantly before Congress and that by a slow process of trial and error Congress gradually firmed up the legislative provisions which emerged in 1914 as Section 14 of the Clayton Act. Thus, the period of gestation of Section 14 did not take place immediately prior to its passage. Instead, its origins are found back in 1890 and its growth came by a steady process of evolution over the twenty-four year period.

1226, H.R. 3591, 58th Cong., 1st Sess. (1903); H.R. 19048, 58th Cong., 3d Sess. (1905); H.R. 15329, H.R. 18801, 59th Cong., 1st Sess. (1906); S. 3736, 61st Cong., 2d Sess. (1909); S. 8531, 61st Cong., 1st Sess. (1910); H.R. 26541, 61st Cong., 2d Sess. (1910); S. 2158, H.R. 10508, H.R. 11855, H.R. 12624, H.R. 12809, H.R. 13909, 62d Cong., 1st Sess. (1911); S. 3345, H.R. 14063, H.R. 16285, 62d Cong., 2d Sess. (1911); S. 4103, S. 5486, H.R. 23470, 62d Cong., 2d Sess. (1912); S. 7680, 62d Cong., 3d Sess. (1912); S. 191, S. 486, S. 1375, H.R. 1890, H.R. 2958, H.R. 4326, H.R. 4548, 63d Cong., 1st Sess. (1913).

Several of these bills proposed an amendment to Section 8, which would have expanded the definition of "person" to include "agents, officers, and attorneys of said corporations and associations."[19] A number of others incorporated aider and abettor provisions.[20]

Of particular significance is the legislative history of a bill that was passed in the House on April 7, 1900. That bill proposed an amendment to Section 8 of the Act which would have redefined "person" as follows:

> "That the word 'person' or 'persons' wherever used in this Act, shall be deemed to include corporations and associations existing under or authorized by the laws of either the United States, the laws of the Territories, the laws of any State, or the laws of any foreign country, *and the agents, officers, and attorneys of said corporations and associations*," (H.R. 10539, 56th Cong., 1st Sess. (1900); emphasis supplied).

The House Judiciary Committee Report to the bill stated:

> "Section 8 of the present law did not include in the definition of 'person' or 'persons' the agents, officers,

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19. See for example Senate bill, S. 649, 57th Cong., 1st Sess. (1901); House bills, H.R. 10539, 11002, 11667, 57th Cong., 1st Sess. (1900); H.R. 3, 57th Cong., 1st Sess. (1901); H.R. 11988, 14947, 57th Cong., 1st Sess. (1902).

20. See Senate bills, S. 682, 53d Cong., 1st Sess. (1893); S. 192, 54th Cong., 1st Sess. (1895); S. 2330, 55th Cong., 1st Sess. (1897); House bills, H.R. 4600, 52d Cong., 1st Sess. (1892); H.R. 7492, 55th Cong., 1st Sess. (1897); H.R. 11855, 62d Cong., 1st Sess. (1911).

and attorneys of the corporations and associations referred to, and their action as such agents, officers, and attorneys did not subject them to any penalties under the law. . . ." H. Rep. No. 1506, 56th Cong., 1st Sess. (1900).

The minority members of the House Committee on the Judiciary, even more desirous of strengthening the Act, sought to add criminal provisions encompassing corporate officers and agents, to several new provisions in the bill. One proviso read that "*every person* who shall make, or enter into, or engage in, any such contract, combine, device, trust, or combination in the form of trust or otherwise, or conspiracy, *or shall be a promoter thereof, or officer or agent therein,* shall be deemed guilty of a misdemeanor . . ."[21] (Emphasis supplied)

Representative Overstreet, in defending the bill stated:

"It has been found in many instances where corporations have violated the laws which subject them to fines that they have little care for the expense inci-

21. H. Rep. No. 1506, Part 2, 56th Cong., 1st Sess. (1900). Representative Parker, in a separate minority report stated:

"The undersigned desires to express his entire agreement with the bill reported by the committee, except as to one section. Valuable amendments to the Sherman law are proposed, not only in increasing the penalties for its violations, but in extending them to officers and agents, extending the right of prosecution to those who are injured, and in protecting witnesses." H. Rep. No. 1506, Part 3, 56th Cong., 1st Sess. (1900).

dent to the payment of such fines, and *the officer, agent, attorney, or manager is never liable, and escapes under the cloak of his corporate existence.* The individual is little concerned if the corporation pays his fine. If he shall be made liable personally, and if convicted, imprisoned, he will exercise more care.

"This Committee believes that by increasing those penalties so as to fix definitely upon the violator the probability of imprisonment, and *adding to the persons* who may become liable under the law the officers, the attorneys, the managers, and the agents, of such concerns, they will hesitate far more than they have in the past before they care to violate this statute. . . .

"Section 8 of the bill defines the word 'person,' wherever used in the act 'to include corporations and associations.' Your committee has *enlarged by* amendment that term and definition and *adds to its meaning,* wherever the term 'person' shall be used in the act, 'the agents, officers, and attorneys of such corporations and associations.'" (33 Cong. Rec. 6477; emphasis supplied).

In the Senate, the bill was submitted to the Senate Committee on the Judiciary. Senator Hoar, one of the principal authors of the Sherman Act, introduced an amendment that differed considerably from the House bill, but significantly retained the expanded definition of the word "person" incorporated in that bill (34 Cong. Rec. 2728). Although the bill never became law, it is quite clear that both the House majority and minority and leading members of the Senate found the phrase "every person" inadequate to penalize corporate officers and agents.

In 1902, Senator Hoar, then Chairman of the Senate Judiciary Committee, introduced a bill which would have broadened the coverage of the Sherman Act to make liable the "president, director, treasurer, officer, corporator, copartner, associate, or agent" of a corporation or other business entity (S. 6659, 57th Cong., 2d Sess. 1902).

In commenting on his bill he stated that "It is but one step farther. I adhere to the opinion I entertained when the present law was drawn--that we should go very slowly and carefully, taking one step in legislation, at a time; and then waiting for the exposition of the courts, and until some practical trial has taught the law officers of the Government what is practicable and what is needful. It was with that expectation that the law, commonly called the Sherman antitrust law, was fashioned" (36 Cong. Rec. 523).

Senator Hoar's bill and remarks accurately reflected the mood of Congress during the period between 1890 and 1914 while Congress was slowly working out, by trial and error, the language which evolved into the Clayton Act in 1914.

C. The Intent of Congress to Exclude Corporate Representatives from the Sherman Act was not Negatived by any Supposed Common Law Criminal Rules or Supplanted by Decisions Which Dealt With Individuals Acting for Their Own Account.

When Congress defined the word "person" in the Sherman Act to include a corporation, it did not also include

the representatives of the corporation as "persons." This plain meaning and the legislative history supporting it are unmistakable. So far as the corporate form of doing business was concerned only the corporate entity was brought under the Sherman Act. Coverage of representatives of the corporate entity was left to the future.

What does the Government offer to overcome this clear-cut meaning and intent? First, the Government contends that when Congress enacted the Sherman Act in 1890 it had in mind what the Government says was a common law rule of crimes that an agent who participates in a misdemeanor committed by his principal is also liable as a principal (G.B. 14-15). In support of its proposition it cites a heterogeneous group of fifteen cases. All but three are state court and foreign cases.[22] *Tyler* v. *Savage*, 143 U.S. 79 (1892) was a civil fraud case and has no bearing here. The other two

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22. The Government devoted less than a page to discussing all fifteen. The twelve state and foreign cases are not applicable to questions of federal criminal law. Three applied an aider and abettor statute and were decided after 1890, *People* v. *Clark*, 8 N.Y. Crim. Rep. 179, 14 N.Y. Supp. 642 (1891); *State* v. *Ross*, 55 Ore. 450 (1910); *Rex* v. *Hays*, 14 Ont. L.R. 201 (1907). Also decided in or after 1890 were *People* v. *Detroit White Lead Work*, 82 Mich. 471, (October 1890); *People* v. *Duke*, 44 N.Y. Supp. 336, 19 Misc. Rep. 292 (1897); and *State* v. *Carmean*, 126 Iowa 291 (1905); four dealt primarily with the question of whether a corporation was liable for misdemeanors committed by its agents, *State* v. *Morris & E.R. Co.*, 23 N.J.L. 360 (Sup. Ct. 1852); *The Queen* v. *Great North of England Ry. Co.*, 9 Q.B. 315 (1846); *State* v. *Great Works Milling & Man. Co.*, 20 Me. 41 (1841);

federal decisions cited are *United States* v. *Gooding*, 25 U.S. (12 Wheat) 460, 471 (1827), and *United States* v. *Mills*, 32 U.S. (7 Pet.) 138 (1833) (G.B. 15). Both involved special statutory aider and abettor provisions applicable to the specific offenses there involved, but obviously those do not apply to the Sherman Act.

Even if there had been any such applicable common law rule Congress certainly did not intend to apply it, as shown by the legislative history set forth above. Furthermore, there is no federal common law of crimes (*Viereck* v. *United States*, 318 U.S. 236, 241 (1943); *Jerome* v. *United States*, 318 U.S. 101, 104-105) (1943)) and Congress would not and could not have adopted such a rule unless it was set forth by statute. In *Viereck* v. *United States*, 318 U.S. 236 (1943) this Court said (241):

> "One may be subject to punishment for crime in the federal courts only for the commission or omission of any act defined by statute, or by regulation having legislative authority, and then only if punishment is authorized by Congress."

The Pharmaceutical Society of Great Britain v. *The London and Provincial Supply Ass'n., Ltd.*, 5 Q.B.D. 310 (1880). Three were distinguished by the Government, itself, as involving liability without fault for nuisances committed by the corporation (G.B. 14, n. 6).

One of the holdings in *People* v. *Clark*, *supra*, is distinctly unfavorable to the Government. It held that the penal statute in question, which made "any person or corporation" violating the act liable, did not apply to the corporate officers of a railroad and dismissed two counts of the indictment in which they were so charged. To the same effect is *Rex* v. *Hays*, *supra*.

It is clear that the Government, by citing *Gooding* and *Mills, supra,* is in fact relying on an aider and abettor theory in the case at bar but without labeling it as such. This brings to the forefront the dilemma which the Government faces. Its reliance on an aiding and abetting theory is tacit recognition that "person" in the Sherman Act does not encompass corporate representatives.[23] On the other hand, the Government does not wish openly to embrace the aider and abettor doctrine because Congress in 1914 specifically considered the aider and abettor doctrine with respect to corporate representatives and deliberately rejected it (see point III B, *infra*).

The only other argument the Government makes, in an attempt to counteract the plain meaning of the statute and the clear intent of Congress, is that after 1890, certain indictments and decisions dealing with individuals established the liability of corporate representatives under the Sherman Act. If the Government's premise were correct it would be directly contrary to the intent of Congress in 1890 and utterly inconsistent with the concurrent and constant consideration which Congress from 1890-1914 was giving to the desirability of bringing corporate representatives within the criminal penalties of the antitrust laws.

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23. The Government is unable to cite a case in the 71 year history of the Sherman Act up to the time of decision below which holds that a corporate representative is included within the definition of "person" in the Sherman Act.

But the Government's premise is not correct because it confuses individuals, who happen to have been corporate officials but were acting for their own account, with corporate personnel acting solely in a representative capacity on behalf of a corporation.

The Government next sets forth an appendix of forty antitrust cases intended to show frequent use of the Sherman Act against corporate officials. Examination of the appendix shows, however, that in only three contested cases were final convictions obtained (G.B. 18, n. 11). The Government neither discusses these three cases nor contends that the individuals there indicted were acting solely in a representative capacity. *Tribolet* v. *United States,* 11 Ariz. 436, 95 Pac. 85, 86-87, (1908) (G.B. 18, f.n. 11), the only reported opinion of the three, shows that the defendant along with others was acting in his own behalf and had organized and used a corporation to further his own ends.

The Government gives special consideration to certain other cases which it argues not only established the criminal liability of corporate representatives under the Sherman Act but left no doubt on the matter. An examination of these cases, however, reveals that either the individual was charged with acting in his individual capacity, using the "form and guise" of the corporation for his own ends, or the capacity in which he acted could not be decided on demurrer. None held that a corporate representative could be convicted under the Sherman Act.

In 1912 the Government treated three of the principal cases it now relies upon, *United States* v. *Winslow*, 195 Fed. 578 (D. Mass. 1912), *United States* v. *Swift*, 188 Fed. 92 (N.D. Ill. 1911) and *United States* v. *MacAndrews & Forbes Co.*, 149 Fed. 823 (S.D. N.Y. 1906) as being in the category of cases involving individuals who acted for their own account under the "guise" of a corporation (summary of argument in *Winslow*, 227 U.S. 202, 204 (1913)). The accuracy of this summary is substantiated by the Government's own interpretation of the *Winslow* case in its brief before the Supreme Court:

> "The theory of the indictment is that the various defendants did the acts complained of, but did them through the device and instrumentality of corporations whose actions they controlled and directed and of which they (defendants) were the officers and moving spirit." (Government's Brief in *Winslow*, 3).[24]

The indictment itself in the *Winslow* case, which significantly did not indict the corporation, charged that the individual defendants "carried on, *directed* and *controlled* . . . said trade and commerce . . . *by the device and means of and through and in the names of said* . . . corporation . . . and through certain other corporations which said defendants

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24. The Government implies that this Court's affirmance in *Winslow* was favorable to it (G.B. 26). This is not correct. The appeal to this Court was taken by the Government from the dismissal of several counts of the indictments. The dismissal was affirmed against the Government.

dominate and *control*." 195 Fed. 578, 591.[25] (Emphasis supplied.)

Likewise in *Swift*, 188 Fed. 92 (G.B. 26-27), the indictment charged only the officers, and not the corporations, with engaging in antitrust violations on their own behalf through the "device" of corporations. The indictment stated that the individuals "carried on, directed and controlled said portion of said industry by the device of and means of, and through and in the names of certain corporations, of which they have been the principal owners and the only real managers." (Ind. No. 4509, p. 26)

Both *Patterson* cases, *United States* v. *Patterson*, 55 Fed. 605, 59 Fed. 280 (C.C. Mass. 1893) (G.B. 21-22), and *Patterson* v. *United States*, 201 Fed. 697 (S.D. Ohio 1912) *rev'd* 222 Fed. 599 (6th Cir. 1915) (G.B. 29-30), also involved indictments of individuals and not their corporation, National Cash Register Company, under the guise of which they were acting. In the first, the defendants were charged as individual conspirators and not as corporate officers, the court holding that their relationship to the corporation was inconsequential.

In the second *Patterson* case the only issue resolved concerned the uncertainty and duplicity of the indictment and its failure to charge an offense against the United

25. See 229 U.S. at 203, for further recognition by the Government of the individual character in which the defendants were charged.

States. The district court recognized that the corporation was a pawn of the individuals, stating: "We are concerned with the alleged acts of these defendants. It is distinctly charged (page 10 of the indictment) that they are persons who *controlled* and directed the business and affairs of the said National Cash Register Company." 201 Fed. at 726. (Emphasis supplied).

In *United States* v. *Greenhut*, 50 Fed. 469 (D. Mass. 1892) and *In re Greene*, 52 Fed. 104 (C.C. Ohio 1892), which arose out of the same indictment, only individual defendants were charged with violating Sections 1 and 2 of the Sherman Act through utilization of the "form and guise" of a corporation. Both cases held that the indictment failed to charge an offense. In the *Greenhut* case the court declined to pass on the question of "whether the things charged against the defendants were not rather the doings of the corporation than of its officers," while in the *Greene* case, the court held that if the charges constituted a criminal offense, only the corporation was the "person," as defined in Section 8, which committed the crime.

United States v. *MacAndrews & Forbes Co.*, 149 Fed. 823 (S.D. N.Y. 1906), (G.B. 22-24), the Government's principal case, did not hold liable corporate officials acting solely in a representative capacity. The court twice considered this point in the opinion and each time refused to treat the indictment as confining the charge to acts committed solely in a representative capacity. The court first considered the

matter under the issue of improper joinder. The court said:

> ". . . This argument seems to depend upon the assumption that every factum set forth in the indictment is a piece of joint activity by all the defendants. This is not true. It is charged that the unlawful combination, conspiracy, or monopoly was the result of joint action, but all of the persons alleged to be jointly responsible were not necessarily all doing the same things at the same time. There is nothing inherently impossible in the corporations, doing one thing and the individuals another at or about the same time, which things were utterly different; yet all, when dovetailed together, go to make up the joint product labelled by the Act—combination, conspiracy, or monopoly . . ." (*Id.* 832).

The court subsequently added, in reply to the argument that only corporate acts were alleged, that "it cannot be ascertained upon demurrer whether the acts were all corporate acts or not . . ." (*Id.* 834).[26]

The quotation relied upon by the Government (G.B. 22-23) cannot be helpful to its position because it enunciates the very dilemma mentioned above. As in the *Greene* case, the court referred to the definition of "person"

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26. The court distinguished between cases under statutes which made both the corporation and its officers criminally liable for a single act committed by the officer on its behalf, *i.e.* the Elkins Act, 32 Stat. 847 (February 19, 1903), and the *MacAndrews* case where both the corporation and the officer were charged with committing independent acts which when "dovetailed" together constituted a violation, thus recognizing the indictment as including a charge of individual action, apart from the corporation.

as including corporations; it declined to include individual defendants within that definition. As to individuals the court indicated that they could be indicted only as aiders and abettors. Evidently the district court failed to recognize that there was no federal common law of crimes and that such liability could only be based upon an act of Congress.

The subsequent trial in the *MacAndrews* case resulted in a conviction of the corporate defendants and an acquittal of the individuals (149 Fed. 836 (1907)). Apparently the evidence failed to show that the individuals acted on their own behalf in violation of the Sherman Act.

The court, in *Union Pacific Coal Co.* v. *United States*, 173 Fed. 737 (8th Cir. 1909), reversed the conviction of a corporate officer who had acted solely in his representative capacity. The court noted that the individual defendant was only an agent acting on behalf of his corporation; he therefore could not conspire with it. The court recognized the *MacAndrews* case as holding that corporate officials might be liable when they commit acts in their individual capacities which when combined with, the corporate acts produced an unlawful combination (173 Fed. at 745).

United States v. *American Naval Stores Co.*, 172 Fed. 455 (C.C. S.D. Ga., 1909) (G.B. 25-26) was not an opinion of the district court but a charge by the court to the jury. This charge does not indicate that the individual defendants were alleged to have acted solely in a representative capacity. On

the contrary, this litigation shows that the Supreme Court regarded the question of Sherman Act liability of corporate representatives to be still an open and undecided question. The defendants in *American Naval Stores* appealed to this Court contending that their convictions under the Sherman Act should be set aside since all of their acts were performed on behalf of the corporations of which they were officers. *Nash* v. *United States*, 229 U.S. 373 (1913). In an opinion by Mr. Justice Holmes, this Court stated this contention of the corporate officers:

> "It was argued with a good deal of force that the only evidence of the alleged conspiracy was certain acts done on behalf of the corporations; that the only ground for charging the defendants who were found guilty was their relation to the companies and their being presumably cognizant of and more or less responsible for the corporate acts; that if those acts tended to prove a conspiracy they proved that the corporations more clearly than any one else were parties to it, and therefore that a verdict that was silent as to them ought to be set aside. We need not consider . . . whether on the evidence it was possible to find the defendants guilty by reason of an intent not shown to be shared by the corporations, as the judgment must be reserved for another reason" (*Id.* 379).

It is inconceivable that the Court would have made this statement if it had regarded the Sherman Act liability of corporate representatives as having been clearly established by the earlier cases upon which the Government relies so

heavily. While the Government professes to see nothing in *Nash* contrary to its proposition (G.B. 26), the Court's remarks are directly related to the matter in issue here. The argument was made by the individual defendants that the acts charged were corporate acts and if they amounted to a conspiracy "the corporations more clearly than anyone else were parties to it." The Court regarded this argument as having "a good deal of force." Then in the last portion of the quotation from the opinion, the Court specifically recognized that the individual defendants could have had an intent not shared by the corporations and might possibly be found guilty on this ground.

Thus, one year prior to the passage of Section 14, the Supreme Court treated the liability of corporate representatives as an open and undecided question.

III.

THE LEGISLATIVE HISTORY OF SECTION 14 SHOWS THAT CONGRESS CLEARLY INTENDED THAT THE CRIMINAL LIABILITY OF CORPORATE REPRESENTATIVES WOULD BE GOVERNED SOLELY BY THIS SECTION.

In 1914, when Congress enacted Section 14, its members acted pursuant to the understanding that the criminal liability of corporate officials acting in their representative capacity would be established for the first time and would be governed entirely by the new section. This understanding is plainly shown in the language of Section 14. It is expressed in the Congressional Committee reports on the

bill. And it is clearly shown in the debates. The understanding was entertained by Congressmen on all sides of the issue, regardles of some differing views as to the state of the prior law on the subject.

The Government states that Section 14 cannot be held to control the subject matter of this indictment unless "Congress had a 'clear and manifest' intent to repeal Sherman Act liability" (G. B. 33). In support, it attempts to invoke the principle that "repeals by implication" are not favored, citing *United States* v. *Borden Co.*, 308 U.S. 188 (1939). But the principle has no application here. Appellee does not contend that Sherman Act liability was repealed by Section 14, for the simple reason that the Sherman Act, as we have shown, was not applicable to the situation involved. The only statutory provision which would have been superseded by Section 14 was the general federal aiding and abetting law enacted in 1909, if it was ever applicable. As we shall show, if that provision did apply to antitrust liability of corporate officers, Congress most certainly, expressly and unequivocally, rejected it and put it aside.

But in any event the principle that "repeals by implication are not favored" is not relevant to the issues on this appeal, because the reason behind it is completely absent. That principle is designed to prevent the destruction of substantive liabilities or rights created by prior statutes on the theory that they have been impliedly set aside by a later statute touching the same subject matter. Obviously, in such

cases repeal will be assumed only on the basis of clear evidence of legislative intent. Thus, in the *Borden* case, defendants had urged and the trial court had held that the Agricultural Marketing Agreement Act, by its provisions for regulation of the milk industry, "destroys the operation of Section 1 of the Sherman Act." (308 U.S. at 198). On appeal, this Court defined the issue as whether there had been created by implication an "immunity" from the Sherman Act, with the result that commerce in agricultural commodities would be "stripped of the safeguards" of the antitrust laws against restraint of trade (*Ibid.*). The Court held that the field of regulation of the Act was not "coterminous with that covered by the Sherman Act" and that there was no evidence that Congress meant to supplant antitrust sanctions.

In contrast, no contention is made here that any immunity from the antitrust laws exists, or that their safeguards are in any way diminished. Section 14 *is* an antitrust law, which directly invokes and applies to corporate officials the substantive prohibitions applicable to others. It is clear both from its language and from its legislative history, that Congress in enacting Section 14 *expanded* the applicability of the antitrust laws by covering areas to which they did not theretofore apply. Accordingly, the principle represented by the *Borden* case is entirely inapposite.

The Government treats Section 14 as a sudden legislative aberration which had its source in 1911 (G.B. 34-35).

As we have shown however Section 14 was the culmination of a long process of legislative evolution going back to the inception of the Sherman Act and even before. It represented the end product of both the original efforts to include representatives in the Sherman Act and the subsequent numerous proposals from 1890 to 1914. This background forms an integral part of the legislative history and must be considered along with the events of 1914.

A. The Legislative History Shows That Congress Believed That Enactment of Section 14 Was Necessary and That It Would Control the Criminal Liability of Corporate Representatives in the Future.

The majority in Congress in 1914 believed that enactment of Section 14 was of great importance. The record shows that they intended this measure to be the basis for attaching what was commonly called "personal guilt" to corporate officers. The record of this belief is at the same time a record of belief that the Sherman Act either did not apply, or was of most doubtful applicability.

The Government's contrary interpretation comes from approaching the legislative history with the predetermined premise that the Sherman Act indisputably already applied to corporate officers in 1914 and that everyone in Congress understood this. Because of these assumptions, the Government naturally cannot find a sufficiently "clear and manifest" intent to repeal the supposed Sherman Act "liability."

Its premise, which is erroneous, conceals the correct interpretation.[28]

When the history is viewed from the premise that the antitrust laws did not cover conduct of corporate representatives, and that for twenty-four years Congress had been considering proposals to include them, the debates take on an entirely different appearance. Quite naturally, intent to repeal is not manifest on the part of Congressmen who did not think that the Sherman Act presently applied to the subject matter, or who were in doubt or confused on that question. What is manifest, however, is that all Congressmen assumed that whatever new law was enacted would henceforth govern the subject. And it is equally manifest that Congress directly considered whether the

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28. The Government has supplied an 8-page appendix of quotations from the debates which it says constitute the "pertinent" legislative history (G.B. 72-80). But if the intent of Congress is to be determined from legislative history, nothing less than the whole history is "pertinent," and the Congressional intent in 1914 cannot accurately be ascertained without viewing the whole picture. Discussion of the question will be found in over 40 pages of Volume 51 of the Congressional Record, including: (1) in the House after introduction of the Clayton bill at 9074, 9079, 9080, 9169, 9185, 9198, 9201, 9202, 9261, 9595, 9596, 9608, 9609, 9610, 9675, 9676, 9677, 9678, 9679, 9680, 9681 and 9682; (2) in the Senate after the report of the Senate Judiciary Committee at 14214, 14225, 14226, 14323, 14324, 14325, 14326, 14327, 14328 and 14329; (3) in the Senate after receipt of the Conference Committee report at 15820, 15863, 15943, 15944, 16143, 16158; and (4) in the House after the Conference Committee Report at 16275, 16283, 16317, 16320 and 16321.

Sherman Act itself should furnish a future basis for liability, through the approach of prosecuting corporate officers for aiding and abetting corporate Sherman Act violations, and that Congress expressly and unequivocally voted down and rejected any such Sherman Act approach.

At the opening of the consideration of the Clayton Act, President Wilson gave a short, personal address to Congress, listing the chief matters which he hoped would be covered by the new legislation. One of the most important of his requests was for a law which would bring the individuals responsible for corporate violations within the scope of the antitrust laws. His statement on this subject also shows so plainly the general assumption of the nation's leaders that the Sherman Act did not then reach corporate officials who acted in a representative capacity that the part of the message dealing with this subject is quoted in full:

> "Inasmuch as our object and the spirit of our action in these matters is to meet business half way in its processes of self-correction and disturb its legitimate course as little as possible, we ought to see to it, and the judgment of practical and sagacious men of affairs everywhere would applaud us if we did see to it, that penalties and punishments should fall, not upon business itself, to its confusion and interruption, but upon the individuals who use the instrumentalities of business to do things which public policy and sound business practice condemn. [Applause.] Every act of business is done at the command or upon the initiative of

some ascertainable person or group of persons. These should be held individually responsible and the punishment should fall upon them, not upon the business organization of which they make illegal use. It should be one of the main objects of our legislation to divest such persons of their corporate cloak and deal with them as with those who do not represent their corporations, but merely by deliberate intention break the law. Business men the country through would, I am sure, applaud us if we were to take effectual steps to see that the officers and directors of great business bodies were prevented from bringing them and the business of the country into disrepute and danger." (51 Cong. Rec. 1979)

The administration supported the Clayton bill on this subject. The original version of Section 14 appeared as Section 12 in the bill (H.R. 15657, 63rd Cong., 2d Sess. 1914). The report of the House of Representatives Committee on the Judiciary accompanying the bill explicitly reflects the understanding that this section will govern prosecutions of corporate officials. It described the section as follows:

"PERSONAL GUILT.

"Section 12 is the personal guilt provision of the bill. It provides that whenever a corporation shall be guilty of a violation of any of the provisions of the antitrust laws the offense shall be deemed to be also that of the individual officers or agents of such corporation, and upon the conviction of the corporation, any director, officer, or agent who shall have authorized, ordered,

> or done any of such prohibited acts shall be deemed guilty of a misdemeanor and upon conviction therefor shall be punished *as prescribed in the section*" (H. Rep. No. 627, 63rd Cong. 2d Sess. 20 (1914); emphasis supplied).

The Senate Judiciary Committee's report on its version of Section 14, was even more explicit that the new law would establish and govern the liability of corporate officials. The Report stated:

> "Existing antitrust acts are further supplemented by a provision that whenever a corporation shall violate the antitrust acts such violation shall be regarded as that also of the individual directors and officers of the corporation who shall have authorized, ordered, or committed any of the acts constituting such violation, *thus fixing the personal guilt of the officials of the corporation who are responsible for the infraction of the law*" (S. Rep. No. 698, 63rd Cong., 2d Sess. 1-2 (1914); emphasis supplied).

The Government's only substantial response to these statements in both Committee reports is that they do not contain an expression of intent to repeal the supposed existing Sherman Act criminal liability of corporate officers. (G. B. 42-43) Quite naturally, committees of Congress which had been asked by the President to provide a punishment for corporate officials not provided by existing law would not be speaking of repeal of existing law. Neither do the reports acknowledge that the Sherman Act was applicable, as the Government contends, but pro-

ceed with the business of providing the law on the subject. If they had any other purpose than to determine the law through Section 14, none is revealed. Their words should be taken at their plain, face value: corporate officials were henceforth to be "punished as prescribed in this section," (House Report) which was passed for the purpose of "fixing the personal guilt" of such officials (Senate Report).

Although the language of the statute and the committee reports both make reference to the debates unnecessary, it is clear that the debates in both houses of Congress, when viewed as an entirety, and not in terms of isolated excerpts, show a basic understanding on the part of the majority leaders that existing law was deficient and that the new statute would be the governing law on the subject.

At the outset of the debates in the House, the new chairman of the Judiciary Committee, replacing Representative Clayton was Representative Webb. Mr. Webb introduced what later became Section 14 by summarizing the provisions of the section and quoting from President Wilsons' address. He stated:

> "In this section we have attempted to make guilt personal, and we believe we have succeeded in doing so" (51 Cong. Rec. 9074).

Chairman Webb did not say that the intention was to add to, or supplement, some kind of existing Sherman

Act coverage of corporate representatives. He said that the plan was "to make guilt personal."

Later in the House debates, as the Government has pointed out (G. B. 36), concern was expressed that under the wording of the original bill, which began, "Whenever a corporation shall be guilty of the violation of any of the provisions of the antitrust laws," it would be necessary, as Representative Mann put it, "to find the corporation guilty before any of them can be convicted" (51 Cong. Rec. 9609). (See also remarks of Representatives Beall, *Id.* 9677 and Towner, *Id.* 9679). This concern occupied a major part of the total House discussion of the section. It is most unlikely that this much concern would have been manifested unless it was assumed that whatever bill was finally enacted would govern the prosecution of corporate officials. Moreover, there would be no basis for such concern if the Sherman Act already covered these corporate representatives.

The problem was finally resolved by adoption of an amendment by Representative Lenroot which was in the language now found in Section 14 (*Id.* 9682). Instead of a requirement that the corporation be "guilty," the statute as amended reads, "Whenever a corporation shall violate" any of the penal provisions of the antitrust laws. In agreeing to this amendment, Representative Webb again stated that what the sponsors wished was "to make guilt personal,"

and he believed that this statute would do that. (*Id.* at 9681).

Belief in the need for Section 14 to deal with the problem was repeatedly stressed by others. Representative Helvering stated that "the greatest weakness in our law comes from the punishment of corporations and neglect to locate and punish personal guilt" (*Id.* 9185). Representative McGillicuddy, a member of the Judiciary Committee, called the new section "one of the most necessary and important remedies in the whole bill" (*Id.* 9261). Representative Hulings stressed the same great need (*Id.* at 9678).

Probably none on the majority side in the House believed more strongly in the need for this new provision than Representative Floyd, a member of the Judiciary Committee and one of the spokesmen for the bill. It is therefore a great irony that the Government has virtually adopted him as the purported spokesman for its view and has sought to use some of his statements to support its argument that the new law was not needed, and that it added so little to the prior law that the precise addition made cannot even be described.

It has already been pointed out, *supra*, p. 16 that Representative Floyd stated that this bill was greatly needed in order to prosecute officials who "authorize" or "order" corporate violations, *i.e.* to reach persons who have done pre-

cisely what the indictment in this case charges appellee with doing. According to Mr. Floyd, who made this point over and over in the debates, it was not possible under existing law to reach such officials.

Mr. Floyd stated:

> "The purpose of this section is to enable the Government, when it has convicted the corporation, to reach those *responsible officers* who have been proven in the trial to be guilty of a violation of law by presentment of an indictment and trial. It authorizes their conviction not only for acts *done* but for acts *authorized* or *ordered* to be done***" (Id. 9679; emphasis added).

Thus it is clear that Mr. Floyd fully understood that Section 14 was to cover all three categories of conduct, i.e., authorizing, ordering and doing. The Government has not explained how a Congressman who felt this strongly about the need for the new law could at the same time entertain the views attributed to him by the Government's interpretations.

Similarly, in the debates in the Senate, the chairman of the Senate Judiciary Committee, Senator Culberson, made the Congressional intent to control corporate officials through this law as explicit as it could be. In the following important colloquy, he stated that this section would provide for "personal guilt." In direct response to questions, he stated further that the Sherman Act did not

reach corporate officials and that this section "is intended to supply that deficiency":

> "MR. CULBERSON. This is the personal-guilt section of the bill. The committee thought that the language employed by the amendment was the more direct way of reaching the same result as that contemplated by the House provision."
>
> * * * *
>
> "MR. CULBERSON. *The Sherman Act provides the penalty where the corporation acts, and it is against the corporation. This provision penalizes the individuals who act for the corporation and is, as it has been very often termed, the personal-guilt portion of this bill.*
>
> "MR. KENYON. The Senator does not claim that section 1 of the Sherman Act does not penalize the individual?
>
> "MR. CULBERSON. *What I mean to say is this: Heretofore, under the Sherman Act, if a corporation were guilty of a violation of that act, the guilt of that corporation would not be visited upon the individual director or agent or officer who authorized or committed or induced the act. This section is intended to supply that deficiency and to visit upon the officers and agents of the corporation responsible for the conduct punishment for the act of the corporation.*"
>
> "MR. KENYON. I think that is a good purpose, if it is carried out" (*Id.* 14324; emphasis supplied).

The question of Mr. Kenyon that "The Senator does not claim that Section 1 of the Sherman Act does not penalize

the individual?" does not mean what the Government implies (G.B. 37 n. 18) but refers to the admitted fact that individuals were subject to the Sherman Act if not acting as representatives of a corporate entity. This is clearly shown by Senator Kenyon's satisfaction with Senator Culberson's answer to his question, as quoted above and Senator Kenyon's understanding, expressed shortly before, that, "section 12, if that is the personal-guilt section, does not in any way apply to individuals except as the individuals are officers or directors of corporations" (51 Cong. Rec. 14324).

We have summarized above and quoted from the principal Congressional statements which urged that there was a need for the new law because of the inadequacy or failure of the old law to reach the special problem posed by corporate officials. These statements all rest on the obvious premise, sometimes explicit, sometimes implicit, that the Sherman Act was inadequate to cover the matter. Nor was this premise a new one. On the contrary it was persistent and ever present during the twenty-four year period of legislative proposals leading up to Section 14.

The Government, despite this record, makes the contrary claim that all but one of the Congressmen who spoke on Section 14 in the debates "recognized the existing Sherman Act liability of corporate officers actively participating in an offense" (G.B. 37-38 n. 18, 19). This generalization and its supporting note are decidedly in error. First, the Government has not listed a number of Congressmen

who spoke on Section 14 during the debates, including Representatives Fess (51 Cong. Rec. 9080), Helvering (*Id.* 9185), Taggart (*Id.* 9198), McGillicuddy (*Id.* 9260-9261), Mann (*Id.* 9609, 9675 *et seq.*), Beall (*Id.* 9677), Metz (*Id.* 9609), Bryan (*Id.* 9680 *et seq.*), McCoy (*Id.* 9679 *et seq.*), and Hulings (*Id.* 9678), and Senators Jones (*Id.* 14325-14326), Chilton (*Id.* 14326-27), Nelson (*Id.* 15943-44) and Martine (*Id.* 14325).

Furthermore, several of the members of Congress not listed by the Government made statements which either expressly contradict the Government's generalization or are implicitly inconsistent with it. For example, Representative Fess stated: "I did not know that the Sherman antitrust law provided that if the corporation was found guilty of violating the law, that guilt would also be deemed to apply to the directors." (*Id.* 9080). The statements of Representatives Helvering, McGillicuddy, and Hulings have been referred to above. Senator Martine said, "I will vote for establishing the personal guilt and for the personal punishment of these men. . ." (*Id.* 14325). Senator Jones exhibited a similar frame of mind (*Id.* 14326). Senator Chilton also did so, when he said, "This law does make crime personal." (*Id.* 14327).

Moreover, the Government claims support from Congressmen whose remarks cannot fairly be interpreted in this manner. For example, Representative Campbell made no affirmative statement; he merely asked a question (*Id.*

9201). Representative Webb, in the colloquy cited, did not say anything to support the Government contention; indeed, he said; ". . . and that is the only way in which we have undertaken to amend the Sherman antitrust law at all—that is, in making guilt personal" (*Id.* 16275). There seems no basis for claiming that Representative Barkley (*Id.* 9681) or Senator Cummins (*Id.* 14328) made any statement favorable to the Government contention.

Most of the other Congressmen and Senators cited by the Government had the common denominator of being in the minority and opposed to the bill, largely for the reason that it was not strong enough. The views and actions of these Congressmen, however, give no support to the Government contention concerning the intent of Congress. Indeed, the issue which they precipitated in Congress resulted in a crystal-clear manifestation of Congressional rejection of the theory here urged by the Government. In a negative reaction to the minority position, the majority of Congress flatly expressed an intent opposite to theirs. In thus acting, Congress as a matter of record repudiated the position taken by the Government here.

Representative Floyd's remarks, so heavily stressed by the Government to the virtual exclusion of all else in the legislative history, fully support appellee's position. They provide no support for the theory that the Sherman Act was then believed by the majority of Congress to reach the corporate official acting only in his corporate capacity, as

distinguished from the corporate official who acted individually, or who was in fact the corporation itself. As Mr. Floyd said in language which was characteristic of his thinking:

> "But if the individual *independently* had violated the Sherman law and was guilty of violation of it in any way *as an individual,* he could be convicted without ever convicting the corporation. . . ." (*Id.* 9679; emphasis supplied; see also *Id.* 9676).

This states exactly the distinction between the application of the Sherman Act which did cover individuals acting "independently" and for their own account and the application of Section 14 which was to cover for the first time individuals acting *not* "independently" but as corporate representatives authorizing, ordering or doing corporate acts.

B. Congress Rejected Aider and Abettor Prosecution of Corporate Representatives Under the Sherman Act and Also Under Any General or Special Statutory Provisions.

Congress in 1914 expressly rejected the "aiding and abetting" doctrine for prosecution of corporate representatives in antitrust cases. The Government in this case has not expressly relied on an aider and abettor theory, but as pointed out above, it has sought tacit support from the theory. The Congressional treatment of this subject matter in 1914 therefore assumes particular importance.

When Congress was considering the adoption of Section 14, the aiding and abetting doctrine played a prominent part in its deliberations. The opposition to Section 14 and the espousal of aiding and abetting by the minority in Congress took three forms. It was contended that Section 14 was unnecessary because of the general aiding and abetting provisions of the Criminal Law (51 Cong. Rec. 9079-80, 9201, 9677, 16283). It was also proposed that if special provision was to be made for antitrust violations by corporate representatives, a separate offense should not be established but an aiding and abetting section should be adopted applicable to antitrust violations similar to that contained in the Interstate Commerce Act (the Volstead amendment). Finally, in the Senate it was proposed that Section 14 be adopted but broadened to include aiding and abetting (S. Report No. 698, 63rd Cong., 2d Sess. 74 (1914)).

In the House, Representative Volstead contended that Section 14 was unnecessary (51 Cong. Rec. 9680, 9681, 16283). Failing to convince the House of this he offered an aider and abettor amendment which, unlike Section 14 creating a separate offense, made all aiders and abettors subject to the substantive provisions of the antitrust laws as in the Interstate Commerce Act[29] (*Id.* 9676). Representative

29. The Volstead proposal was: "Any person who shall do, or cause to be done, or shall willingly suffer or permit to be done any act, matter, or thing prohibited or declared to be unlawful in the antitrust laws or shall aid or abet therein, shall be deemed guilty of such prohibited and unlawful acts, matters, and things and shall be subject to the punishments prescribed therefor in the antitrust laws" (51 Cong. Rec. 9676).

Green remarked that this amendment embodied the general principles of the aider and abettor statute (*Id.* 9677, 9678).

The majority in the House was opposed to the aider and abettor amendment. Mr. Floyd voiced their objections:

> "I have several objections . . . I think it is indefinite . . . drastic and goes too far. It not only proposes to make unlawful the act of any person that aids and encourages but also makes unlawful the acts of those who assist in any way those who violate the antitrust laws" (51 Cong. Rec. 9676).

The House thereupon voted upon and rejected the Volstead amendment (*Id.* 9678). On the same day, it adopted the Clayton bill provision, as revised by the Lenroot amendment (*Id.* 9682).

In the Senate, it was first proposed that Section 14 be adopted but broadened to include aiding and abetting (S. Rep. No. 698, 63rd Cong., 2d Sess. 74 (1914)).[30]

A Conference Committee rejected the Senate aider and abettor version and accepted the House version of Section

30. "That every director, officer, or agent of a corporation which shall violate any of the penal provisions of the antitrust laws, who shall have *aided, abetted, counseled, commanded, induced, or procured such a violation*, shall be deemed guilty of a misdemeanor, and upon conviction thereof of any such director, officer, or agent, he shall be punished by a fine of not exceeding $5,000 or by imprisonment for not exceeding one year, or both, in the discretion of the court." (Emphasis supplied)

14 with minor changes. The minority continued to attack Section 14 and criticized the Conference Report. Mr. Volstead, leader of the House opposition stated:

> "The Criminal Code has this provision: [reading the Federal aiding and abetting statute][31]
>
> "That broad and comprehensive language is to be supplanted by Section 14, and here is the language: [reading it].
>
> "Under the language of this new section only those who authorize, order, or do any of the acts forbidden are guilty, while under the present law not only are those guilty but in addition all who abet, counsel, induce, or procure the commission of the act, whether they authorize or command it or not. The penalty in this new section is exactly the same as in the present Sherman law. There is no increase in the penalty. The effect of this section is to relieve persons now liable to the penalties of the Sherman law . . ." (*Id.* 16283). See also *Id.* 9676, 9681.

Senator Nelson, one of the leading minority conferees, called attention to both the general aiding and abetting statute and the language of the Senate version which was taken from that statute. During the debate on the Conference Report he said:

> "There we had the most comprehensive and drastic language . . . while the language found in the conference report limits the offense, so that in many cases officers and directors, if they are careful not to come

31. 35 Stat. 1152 (1909), 18 U.S.C. § 2.

> out in the open and give and order . . . [or] authorize the act . . . [or] do the act themselves, will be immune and cannot be punished. Under the drastic language of the Criminal Code nothing further was needed . . . than that section of the Code . . . Senators can see how the change of that language dilutes and diminishes the force and effect of the entire provision. The provision of the Criminal Code is ample to cover the offenses of officers and directors in such cases, and hence there is no need for such a section as Section 14, and if the section remains in the bill it ought to have the scope and vigor of the Criminal Code, and not be weakened and diluted as it is in the bill" (*Id.* 15944).

The various aider and abettor provisions were fully debated and Congress was thus fully aware of the doctrine and the various ways in which it might have been made applicable to antitrust violations by corporate representatives. Nevertheless Congress decided to adopt the specific language of Section 14, limiting violations to "authorized", "ordered", or "done", and rejecting reliance upon or the use of the aiding and abetting doctrine in any form. The outspoken stand taken by opponents to Section 14, as evidenced by their efforts to defeat and amend it and their constant admonitions that Section 14 was more limited than the general aiding and abetting statute, are implicit recognition that Section 14 would be controlling as to the liability of corporate directors, officers and agents acting on behalf of the corporation.

Section 14, being a specific enactment on the subject matter, prevails over the general aiding and abetting provisions of the Federal Criminal Law which might otherwise have been controlling. *Kepner* v. *United States*, 195 U.S. 100, 125 (1904). See also *D. Ginsberg & Sons* v. *Popkin*, 285 U.S. 204, 208 (1932); *MacEvoy Co.* v. *United States*, 322 U.S. 102, 107 (1944). "A law embracing an entire subject, dealing with it in all its phases, may thus withdraw the subject from the operation of a general law as effectually as though, as to such subject, the general law were in terms repealed." *Cook County Nat'l. Bank* v. *United States*, 107 U.S. 445, 451 (1882).

A similar statutory question arose in *United States* v. *Lucas*, 114 F.Supp. 583, 584 (N.D. W.Va. 1949) when defendant was convicted of aiding and abetting the escape of several prisoners incarcerated in a federal penitentiary. As a principal he was sentenced to five years under the Act. Recognizing that the Federal Escape Act provides a specific aider and abettor provision with a maximum three-year sentence, the court held that the Department could not proceed under a general statute for a crime which is covered by a specific one.

If Congress had desired Section 14 to be broader and more encompassing it would have enacted an aider and abettor provision as a part thereof. It did just this in Section 10 of the Clayton Act where directors, agents, managers, and officers of common carriers who aid and abet the com-

mission of a wrongful act set forth in that section, are made liable to criminal punishment as well as the carrier. 15 U.S.C. § 20.

As recognized in *United States* v. *Dotterweich*, 320 U.S. 277 (1943) the intention of Congress must govern as to the applicability of the general aider and abettor statute. See *Sherman* v. *United States*, 282 U.S. 25 (1930), cited therein. Congress has made this intention unmistakably clear by adopting Section 11 and rejecting aider and abettor in any form.

In summary, the legislative history, when viewed in its entirety, instead of in terms of a few isolated excerpts, clearly shows that the majority in Congress: (1) did not believe that the Sherman Act applied to the actions of ordinarily corporate officials acting within the scope of their employment; (2) specifically rejected aider and abettor provisions under the Sherman Act and also under any other general or special statutory provisions; and (3) adopted a carefully-worded and deliberately limited Section 14 which they certainly intended to govern exclusively the antitrust prosecution of corporate representatives.

IV.

THE QUESTION PRESENTED HERE AROSE WHEN CONGRESS INCREASED SHERMAN ACT PENALTIES IN 1955. NO COURT PRIOR TO THE DECISION BELOW HAD DECIDED THE QUESTION.

The action of Congress in 1955 in raising fines under the Sherman Act but not under Section 14 of the Clayton Act

brought into sharp focus the problem of criminal antitrust charges against corporate representatives. Thereafter it became of vital importance to a corporate representative to determine whether he was subject to a fine of $5,000 under Section 14 of the Clayton Act, or $50,000 under Section 1 of the Sherman Act. In the forty-one years prior to 1955, when the maximum fines under the two sections were exactly the same, there was no occasion to raise the issue, and consequently, it had not been raised or decided during that time. The failure to raise the issue when it was purely academic is, as the lower court held, "of little significance" (196 F. Supp. at 157).

In *Boyd* v. *Alabama*, 94 U. S. 645, 648 (1876), the court said:

> "Courts seldom undertake, in any case, to pass upon the validity of legislation, where the question is not made by the parties. Their habit is to meet questions of that kind when they are raised, but not to anticipate them. Until then, they will construe the acts presented for consideration, define their meaning, and enforce their provisions. The fact that acts may in this way have been often before the court is never deemed a reason for not subsequently considering their validity when that question is presented. * * *"

The Government contends, however, that it is improbable that corporate officials would not have sought dismissal of Sherman Act indictments against them if Section 14 was the sole method for prosecuting them. On the contrary it is highly improbable that any individual cor-

porate official would have raised the issue and certainly none of them did. An individual saddled with the anxiety and expense of defending against an antitrust indictment could hardly be expected to volunteer to finance a test case to determine whether he should be subject to liability under Section 14 instead of Section 1 when the penalty under the former was exactly the same as the penalty under the latter and the only victory would be an academic one.

In essence the Government's position is exactly the same as that of Congressman Volstead and his supporters who were the minority in Congress and were opposed to the enactment of Section 14. The Government's persistence in ignoring Section 14 during the period when individual defendants would have had nothing to gain by raising the issue cannot foreclose the matter.[32]

Following the enactment of Section 14 there have been a few cases which have referred to it and some have expressed, collaterally, an opinion as to the section's meaning or purpose. Of these cases the only one that recognized and applied the distinction involved here is *Hartford-Empire Co.* v. *United States,* 323 U.S. 386 (1945).

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32. Compare for example, *Bruce's Juice, Inc.* v. *American Can Co.,* 330 U.S. 743, 750 (1947) and *Moore* v. *Mead's Fine Bread Co.,* 348 U.S. 115 (1954), to *Nashville Milk Co.* v. *Carnation Co.,* 355 U.S. 373 (1958), where, until the right to bring a treble damage action for violation of Section 3 of the Robinson-Patman Act was specifically challenged and denied, the right was assumed to have existed.

Hartford-Empire was a civil case. The pertinent point was the Supreme Court's consideration as to whether injunctions should be issued against the individual defendants who were corporate officers. The Court held that the injunctions should not issue against the individuals to enjoin the corporate violations. It expressly recognized the two capacities in which a corporate official might act—"on behalf of or in the name of a corporate defendant", or "as individuals acting for their own account."[33] The Court found that the individual defendants had acted solely in a corporate capacity and held that there was therefore no need to enjoin them personally, saying (323 U.S. 386, 434-435):

> "That these individuals may have rendered themselves liable to prosecution by virtue of the provisions of § 14 of the Clayton Act is beside the point, since relief in equity is remedial, not penal."

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33. The Court said (323 U.S. 386, 433-434): "A word should be said concerning the inclusion in many paragraphs of the decree, and in many of the injunctions imposed, of various individual defendants who in the past have acted as, and who at present are, officers or directors of the corporate defendants. *They offended against the antitrust laws by acting on behalf of, or in the name of, a corporate defendant.* There are no findings, and we assume there is no evidence, that any of them have applied for, owned, dealt in, and licensed patents appertaining to the glassware art. *Nor is there evidence or finding that, as individuals acting for their own account, any of them, as a principal, has entered into any of the arrangements found unlawful by the court.*" (Emphasis supplied).

The importance of *Hartford-Empire* is this: It is the only case between 1914 and 1961 which recognized (with respect to antitrust violations involving corporate officials) that there was a material distinction between such officials acting individually and for their own account and corporate officials acting solely in a representative capacity. In *Hartford-Empire* the Court found, unlike the cases upon which the Government relies, that the corporate officials were acting solely in a representative capacity. Having so found, and considering in passing, the possible criminal liability of the corporate officials, the Court settled on Section 14 as the applicable criminal section. The Court then used this same finding as the basis for its holding that it was unnecessary to enjoin the corporate officials as individuals in order to prevent further corporate violations, saying in effect that it was enough to enjoin the office or position rather than the man.[34]

An examination of the cases cited by the Government will show that in none of them did the court decide, or consider that it was called upon to decide that Section 14 instead

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34. *United States* v. *Vehicular Parking, Ltd.*, 54 F. Supp. 828 (D. Del. 1944) (G.B. 58-59, n. 25) is not in point. Unlike *Hartford-Empire* it involved individuals acting for their own account. This is shown by the facts stated in the original opinion (54 F. Supp. 828, at 831) and by two later opinions which the Government does not cite, the first recognizing that the individuals were not acting as corporate representatives (56 F. Supp. 297, at 297), the second (61 F. Supp. 656 at 657) indicating that the facts were distinguishable from those in *Hartford-Empire*.

of Section 1 should apply to corporate officials acting solely in a representative capacity.

The first cases relied on by the Government are the group arising out of the *National Malleable* indictment (G.B. 52-55). All but one of the cases in this group were criminal removal cases. The principal case was *United States* v. *National Malleable & Steel Castings Co.*, 6 F.2d 40 (N.D. Ohio, 1924). In this case the district court upheld indictments against 52 corporate defendants and 49 individual defendants. The defendants did not contend, however, that the indictment improperly charged them under Section 1 because Section 14 was the exclusive section applicable. This is readily apparent from the court's statement of the case (p. 41):

> "In support of the motion to quash and the demurrers to the indictments, the *same objections* are urged alike by the individual and corporate defendants." (Italics supplied).

The objections raised by the corporations and the defendants challenged generally the sufficiency of the indictment but did not make any challenge such as that here.

The related removal cases did not and could not pass on such a question. They involved only the validity of the removal proceedings and not the issues raised by the demurrers to the indictment in the main case. As stated in one of the removal cases, *United States* v. *Mathues* 6 F.2d 149, 151 (E.D. Pa. 1925):

> "As to all of these matters, however, doubtful or disputed questions, whether of fact or of law, are not to be considered upon an application for a warrant of removal."

Each of the other removal cases is in accord with the above statement.

Three conclusions can be drawn from the group of *National Malleable* cases. First, in none of them was the court asked to decide—nor did it decide—whether Section 14 rather than Section 1 applied to corporate representatives; second, all but one of the cases were criminal removal cases where the only issue was the validity of removal; third, despite the absence of any statutory citation in the indictment and the absence of any issue as between Section 14 and Section 1, several of the courts spontaneously adverted to Section 14 as being the logically applicable section for corporate representatives.

Thus, far from being authority for the Government's position, the *National Malleable* cases, as a group, lean the other way. The preliminary recognition which some of those cases gave to Section 14 was the precursor of the clear-cut recognition accorded twenty years later by *Hartford-Empire*.

The Government relies heavily on *United States* v. *General Motors Corporation,* 26 F. Supp. 353 (N.D. Ind. 1939). The indictment there alleged a conspiracy in restraint of trade but did not cite any section of the antitrust laws as having been violated. The indictment did not allege in what

capacity the individual defendants were acting, much less that they acted solely in a representative capacity. The charging portion of the indictment did not differentiate between corporate and individual defendants.

The district court in *General Motors* was not faced with the issue presented here and did not decide it, and did not even mention Section 14.[35]

The portion of the opinion dealing with the individual defendants consists of twelve lines and was directed to a duplicity argument. This is shown by the last line of that portion of the opinion (which the Government does not quote): "This does not render the indictment duplicitous." (26 F. Supp. 355). The duplicity argument[36] has no perti-

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35. This was undoubtedly because the General Motors defendants abandoned the Section 14 argument made in their original brief. In the Government brief in response to the General Motors original brief, the Government stated that it did not rely on Section 14 but that the General Motors indictment was based on Section 1 of the Sherman Act. In the General Motors Reply Brief the defendants accepted that statement saying, "This indictment is admittedly based on a violation of *Section 1 of the Sherman Act only* and is claimed to charge a single conspiracy in restraint of trade on the part of the defendants both corporate and individual." (General Motors Reply Brief, p. 44; emphasis supplied).

The Government's Supplemental Brief, responding to the General Motors Reply Brief, recognized this abandonment (Govt. Supp. Br. in *General Motors*, pp. 28-29).

36. The duplicity argument was based on defendants original belief that the indictment charged the corporations under Section 1 and the individuals under Section 14. They did not claim that the individuals were charged under both sections. That this was their argument was made clear by the footnote on page 45 of the General Motors Reply Brief.

nence here. The defendants did not contend that they should have been charged under Section 14 instead of Section 1 and they did not contend that they could *not* be charged under Section 1 (see n. 35 above).

Furthermore, the court did not find that the individual defendants were charged with acting only in a representative capacity. Quite the contrary. Explicit in the court's decision is a refusal to treat the charge as confined to "their conduct as such officers" (*Id.* 355). The Government itself stated that their designation as officers or agents was "merely descriptive" (Govt. *General Motors* Brief 69).

In the case at bar, on the other hand, the issue presented is limited by the Government's bill of particulars specifying that appellee acted solely "in his capacity as an officer" (R. 34, 35). Clearly *General Motors* did not consider or decide such an issue.

The Government cites *United States* v. *Atlantic Commission Company,* 45 F. Supp. 187 (E.D.N.C., 1942) (G.B. 58-61), as the only other decision in a criminal case (prior to the 1955 amendment to the Sherman Act) which purportedly referred to Section 14. *Atlantic Commission* was another case involving a claim of duplicity arising from defendants' construction of the indictment as charging "also a violation of Section 14" (45 F. Supp. 187, 193).

As in *General Motors* the duplicity argument presented a wholly different issue from the one in the case at bar. Here the indictment is under the Sherman Act and appellee Wise has not construed it as also charging him under Section 14. Instead, he contends that he can not be charged under Section 1 for acting solely in a representative capacity. In *General Motors* and *Atlantic Commission*, the defendants did not contend that they could not be charged under Section 1, but argued that they were being improperly charged under Section 14 in a count which also contained a Section 1 charge.

In *Atlantic Commission*, the court found that the indictment did not purport to charge an offense under Section 14. There was no bill of particulars in *Atlantic Commission* specifying that the individual corporate officers were acting solely in a representative capacity. Nor was the court asked to decide whether corporate officials acting solely in a representative capacity, could properly be charged under Section 1 of the Sherman Act. The court's express reliance upon and quotation from *General Motors* is a clear recognition (1) that the charge against the individual defendants did not relate to "their conduct as such officers" (45 F. Supp. at 195), and (2) that the duplicity issue was the same as in *General Motors*, which is an issue far removed from the issue here.[37]

37. The opinion in *Atlantic Commission* does not indicate what the duplicity point was. Instead of making the *General Motors*

The increase in Sherman Act fines in 1955 not only gave rise to the issue here, but also gave additional support to the proposition that Section 14 was intended to be the exclusive section applicable to cor orate personnel acting solely in a representative capacity. The 1955 action does not in any way support the Government's position (G.B., 63-67).

The 1955 legislative history shows that the purpose of Congress was to punish large corporations more severely. Both the Senate and House Reports stated that the Sherman Act penalty of $5,000 was "insignificant monetarily" as a punishment for large corporations with vast assets (S. Rep. No. 618, H. Rep. No. 70, 84th Cong., 1st Sess. 1955),[38] thus implying that there was a real need to raise the penalty as to them. Both Reports made it absolutely clear that they were not concerned with punishment of corporate officers. For example, in explaining that only the fine is increased and not the term of imprisonment, these reports stated that "inasmuch as most cases involve the acts of corporations rather than individuals, the punishment of imprisonment

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duplicity point (n. 36 above) the individual defendants in *Atlantic Commission* may have contended that they were being charged under both Sections 1 and 14 in one count. If so, the point is equally far removed. Inherent in such a claim would be a concession that they could properly be charged under both sections. Appellee Wise makes no such concession here.

38. This Report was regarded as an additional argument against the Government in *United States* v. *A. P. Woodson Company*, 198 F. Supp. 582, 584 (D. D.C. 1961).

cannot be invoked"[39] (S. Rep. at 2, H. Rep. at 3). This was a clear recognition that acts of the corporation did not subject its representatives to the penalties of the Sherman Act. Thus when these Reports speak of increasing the monetary penalty as the only means of punishing corporate violations of the Sherman Act, they were not considering punishment of corporate officers, and in fact were impliedly recognizing that under the Sherman Act only the corporate entity can be punished for a violation thereof.

In the House of Representatives Mr. Lane stated: "Corporation officials will think twice before they defy the law because heavy fines would bring down upon them the wrath of the stockholders who would observe losses that could never be explained" (101 Cong. Rec. 3946). Failure to mention the much more serious deterrent of indictment and personal pecuniary loss negatives the Government's theory that these heavy fines were intended to be invoked against corporate officials.

The Government seeks to alter the impact of the 1955

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39. As the Government should have recognized, reference to "individual" in these Reports refers to the individual businessman acting in his own capacity (Govt. Br. p. 65-66). This is further verified by the fact that "acts of the corporation" in the above quotation are clearly distinguished from the acts of individuals, which, if the latter were corporate representatives, would have been "acts of the corporation." The portion of the House Report quoted by the Government (G.B. 66) immediately follows the above quotation and clearly, therefore, refers to individuals who do not act as corporate representatives.

legislative history by reliance on remarks made five years earlier by the Assistant Attorney General to the House Subcommittee studying monopoly power in 1950 (G.B. 63-64). This has no significance. The remarks were directed to a bill which would have raised the fine in both the Sherman Act and Section 14 of the Clayton Act to $50,000. The spokesman stated that the Justice Department was primarily interested in Section 1 of the bill which raised the fine for violation of the Sherman Act. The Department may have known why it was "primarily interested in Section 1," but there is nothing to show that it told Congress why. Nor was any light shed on the subject by the Department's statement that it did not care whether its proposal as to Section 2, increasing the fine of Section 14, was accepted or not.

There was in these remarks no mention of corporate representatives and no claim that the Sherman Act as well as the Clayton Act covered them. This item of legislative history surely does not illuminate the inchoate intent of Congress in 1950, much less the intent of Congress in 1955.

Congressman Celler made it clear that the House in 1950 proposed no increase in the Section 14 penalty not for the reason the Government intimates (G.B. 64-65), but because "we want to get the bill through. We did not wish to encourage too much opposition by including acts other than the Sherman Act. We want to be practical. We want a bill passed with widest area of agreement. We are willing

to make progress slowly. Let us increase the penalties under the Sherman Act, which is the most important of all the acts. Then subsequently we may consider the other acts." 96 Cong. Rec. 8071. The Government omits this portion of Mr. Celler's statement quoted in its brief.

The action of Congress in 1955 created a situation which, for the first time, made it of vital importance to a corporate representative to determine whether he was subject to a fine of $5,000 under Section 14 of the Clayton Act, or $50,000 under the Sherman Act. In 1961, the issue thereby created was raised and decided and became this "important question of first impression" (Government's Juris. State. 5).

CONCLUSION

It is therefore urged that the decision of the district court dismissing the Sherman Act counts (Counts 11 and 12) of the indictment as to appellee Wise be affirmed.

Respectfully submitted

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